

# Byron R. White, Last of the New Deal Liberals

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When he was appointed to the Supreme Court in 1962, Byron Raymond White was, at the age of 44, a symbol of the vigor, youth, and intellectual power of the Kennedy administration. From a poor, rural background, he had ranked first in the class of 1938 at the University of Colorado, becoming a football All-American and winning a Rhodes Scholarship. By the time he graduated from Yale Law School in 1946, he had briefly studied at Oxford, played three seasons of professional football, served as a naval intelligence officer in the Pacific, and twice encountered John Kennedy (once at Oxford, once in the Pacific). After clerking for Chief Justice Fred M. Vinson, White joined a law practice in Denver, where he remained for fourteen years. When Kennedy won the Democratic nomination for President in 1960, White chaired the nationwide volunteer group Citizens for Kennedy. His service as Deputy Attorney General under Robert Kennedy included screening candidates for judicial appointments and supervising federal marshals protecting civil rights workers in the South. He had been at that job only fourteen months when the President nominated him to fill the vacancy created by the resignation of Charles E. Whittaker.

During his thirty-one years on the Court, White's contributions generally reflected the commitments of the President who appointed him: to equal opportunity, to effective law enforcement, and to enablement of government as it responds to new challenges—with less concern for group rights, states' rights, and claims of special privilege. To the distress of those who would have preferred greater elaboration of a philosophical vision, he approached the judicial task in a lawyerly and pragmatic fashion—though sometimes in curiously cryptic opinions.<sup>1</sup> His independence and analytic bent of mind often

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1. See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 45 (1989) (White, J., concurring in part and dissenting in part); *South Carolina v. Gathers*, 490 U.S. 805, 812 (1989) (White, J., concurring); *Teague v. Lane*, 489 U.S. 288, 316 (1989) (White, J., concurring in part and concurring in judgment); *United States v. Paradise*, 480 U.S. 149, 196 (1987) (White, J., dissenting).

isolated him from more ideological colleagues. Having served with twenty-one other Justices during times of great ferment on the Court, his role changed considerably. He was in the majority in fewer than half of the five-four decisions during the 1960's, in more than sixty percent of the five-four decisions during the 1970's, and in nearly three-fourths of five-four decisions during the 1980's—more frequently than any other Justice during that decade. (In White's last few terms, Anthony M. Kennedy replaced him as the "swing" Justice.)<sup>2</sup> Although profound changes in American society (often shaped by the Court itself) significantly affected the issues before him and, to a lesser extent, his resolution of particular issues, a review of his work on the Court reveals significant consistency in perspective, method, and conviction.

White always understood that judges make law. His time at Yale Law School was during the heyday of the school's celebration and elaboration of legal realism.<sup>3</sup> As he explained in dissent in *Miranda v. Arizona*:

[T]he Court has not discovered or found the law in making today's decision . . . what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. . . . [Therefore] it is wholly legitimate . . . to inquire into the advisability of its end product in terms of the long-range interest of the country.<sup>4</sup>

Even when he joined with judicial conservatives in refusing to infer new constitutional rights, White mocked the idea that the Constitution can or should be interpreted by reliance on "original intent" or "plain meaning." Thus, even in dissent in an abortion rights case, he asserted:

The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.<sup>5</sup>

This well sums up White's perspective on not only the proper role of the courts in constitutional adjudication, but also the proper roles of the other branches of government in carrying out their constitutional obligations. White clearly appreciated that the triumph of the administrative state, marked

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2. Justice White was in the majority in over 90% of 5-4 cases during October Term 1987. By his final year on the Court, October Term 1992, this had dropped to just over half of 5-4 cases, whereas Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas were each in the majority in approximately three-fourths of 5-4 cases during that Term. Since he joined the Court, Justice Kennedy has been in the majority in two-thirds of the 5-4 cases.

3. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986).

4. *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting).

5. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 789 (1986) (White, J., dissenting).

especially by an affirmative and vigorous federal government, has forever altered the shape of American political institutions, including the Court.<sup>6</sup>

For White, however, neither legal realism nor expanding concepts of national political authority and responsibility justified the exercise of “raw judicial power.”<sup>7</sup> A recurring theme of his opinions was that the judiciary undermines its own legitimacy when it insists upon social or political objectives not rooted in the Constitution and resisted by the democratic institutions of society.<sup>8</sup> White’s confidence in the good faith and capabilities of democratic institutions—Congress, especially, but also the President, state legislatures, and juries—exceeded that of other Justices of the “left” or the “right.” For White, the powers of government are limited neither by abstract conceptions of individual autonomy nor by any extrademocratic mandate for perfection in human affairs. Rather, government power is limited by the very forces that legitimate it: the people acting through fair and free elections, and a Constitution that both authorizes and specifically checks government actors.

In the spirit of the New Deal and of President Kennedy, White gave great weight to securing and preserving federal authority, especially Congress’ authority. Where Congress had legislated (or federal agencies had acted pursuant to delegated power), he was disposed to find federal preemption of state law.<sup>9</sup> Where Congress had not legislated, he gave wide berth to the “dormant” commerce clause.<sup>10</sup> Where states sought to regulate federal entities, he was disposed to place limits on state power.<sup>11</sup> He did not view the

6. See, e.g., cases cited *infra* notes 17-20.

7. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting).

8. This theme was sounded from White’s earliest years on the Court. His first major opinion was a dissent from the Court’s holding, in Robinson v. California, 370 U.S. 660 (1962), that states may not criminalize narcotics addiction. White objected that despite its “present allergy to substantive due process” involving “economic regulation,” the Court was engaged in a similar endeavor by “writ[ing] into the Constitution its own abstract notions of how best to handle the narcotics problem.” 370 U.S. at 689 (White, J., dissenting). See also Thornburgh, 476 U.S. at 787 (White, J., dissenting); Roberts v. Louisiana, 428 U.S. 325, 337-63 (1976) (White, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221-22 (1973) (White, J., dissenting); Miranda v. Arizona, 384 U.S. 436, 526 (1966) (White, J., dissenting). In Bowers v. Hardwick, 478 U.S. 186 (1986), White commanded a majority in proclaiming: “The Court is most vulnerable to and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” 478 U.S. at 194 (White, J.). An almost identical sentence appears in White’s most extensive exposition of his views on the “new” substantive due process, Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting). See also *infra* notes 106-19 and accompanying text.

9. See, e.g., United Steelworkers v. Rawson, 495 U.S. 362, 368 (1990) (White, J.); Edgar v. Mite Corp., 457 U.S. 624, 631 (1982) (White, J.); Maryland v. Louisiana, 451 U.S. 725, 749-51 (1981) (White, J.); Hancock v. Train, 426 U.S. 167 (1976) (White, J.); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 165 (1963) (White, J., dissenting). White also generally supported strong enforcement of the federal antitrust laws, in both private and governmental actions. See, e.g., Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 346 (1990) (White, J., joining dissent). See generally James T. Malysiak, *Justice White on Antitrust: Protecting Freedom to Compete*, 58 U. COLO. L. REV. 497 (1987).

10. See, e.g., South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 87 (1984) (White, J.) (“Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.”).

11. See, e.g., Montana v. United States, 440 U.S. 147, 164 (1979) (White, J., dissenting).

Tenth Amendment as a limitation on Congress' regulatory power;<sup>12</sup> he generally permitted Congress to abrogate state sovereign immunity under the Eleventh Amendment,<sup>13</sup> and he recognized significant legislative power to implement the Fourteenth Amendment.<sup>14</sup> Where Congress delegated interpretative authority to administrative agencies, he deferred to agency interpretations of statutes.<sup>15</sup> In many ways, he was the preeminent nationalist on the Court in the modern era.<sup>16</sup>

White's understanding of the separation of powers in our national government, as set forth in a series of powerful dissents, was similarly rooted in a recognition that Congress must have latitude to solve economic problems and to reallocate governance authorities in response to the growing demands on federal institutions in the post-New Deal era. So it is that he argued in dissent in *Buckley v. Valeo* that "Congress was entitled to determine that personal wealth ought to play a less important role in political campaigns than it has in the past."<sup>17</sup> He lamented in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* that "at this point in the history of constitutional law" the Court should not have "look[ed] only to the constitutional text" to determine Congress' power "to create adjudicative institutions designed to carry out federal policy."<sup>18</sup> He explained in *INS v. Chadha* that the legislative veto is an "indispensable political invention that . . . assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."<sup>19</sup> And in striking down the original Gramm-Rudman-Hollings budget-balancing legislation in *Bowsher v. Synar* because of the Comptroller General's role in implementing the statute, the Court, "acting in the name of separation of powers," had crippled "one of the most novel and far-reaching legislative responses to a national crisis since the New Deal."<sup>20</sup>

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12. See *New York v. United States*, 112 S. Ct. 2408, 2435 (1992) (White, J., concurring in part and dissenting in part); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2408 (1991) (White, J., concurring in part); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (White, J., joining majority opinion overruling *Usery*); *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (White, J., joining dissent); *Oregon v. Mitchell*, 400 U.S. 112, 229 (1970) (Brennan, White, Marshall, JJ., dissenting in part).

13. See, e.g., *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (White, J.).

14. See *Mitchell*, 400 U.S. at 229 (Brennan, White, Marshall, JJ., dissenting in part); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (White, J., joining majority).

15. See, e.g., *Lechmere v. NLRB*, 112 S. Ct. 841, 850 (1992) (White, J., dissenting); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (White, J., joining majority); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (White, J., joining majority); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) (White, J., joining majority); *California v. Southland Royalty Co.*, 436 U.S. 519 (1978) (White, J.).

16. Professor Jonathan D. Varat nicely makes this point at the outset of *Justice White and the Breadth and Allocation of Federal Authority*, 58 U. COLO. L. REV. 371 (1987): "Justice Byron White is a Federalist. Not the modern-day, upside-down, anti-Federalist version of a Federalist, but a national Federalist in the tradition of Alexander Hamilton and John Marshall." *Id.*

17. 424 U.S. 1, 266 (1976) (White, J., concurring in part and dissenting in part).

18. 458 U.S. 50, 94 (1982) (White, J., dissenting).

19. 462 U.S. 919, 972-73 (1983) (White, J., dissenting).

20. 478 U.S. 714, 759 (1986) (White, J., dissenting). The basis of the Court's decision was a provision

White conceived of a less dominant role for the federal courts—neither to supplement nor to supplant congressional policies, but to ensure their fair and consistent implementation by state and federal actors. Often this approach meant urging the exercise of federal judicial review.<sup>21</sup> He emphatically dissented in *Nixon v. Fitzgerald*,<sup>22</sup> which held that the President is absolutely immune from civil damages liability predicated on his official acts, and he was a leading opponent of Justice Rehnquist's positivist approach to procedural due process, explaining that "[p]roperty' cannot be defined by the procedures provided for its deprivation any more than can life or liberty."<sup>23</sup> To achieve consistency in constitutional interpretation, White took an expansive view of the Supreme Court's jurisdiction over state court decisions,<sup>24</sup> and for several years he conducted an extrajudicial campaign for creation of a national court of appeals or similar structure to ensure uniformity in federal law.<sup>25</sup> Most notably, often dissenting from denial of certiorari, he persistently urged—even unto his final days on the Court—that the Court use its discretionary jurisdiction to review apparent inconsistencies in the lower courts.<sup>26</sup>

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in the statute creating the office of the Comptroller General which permitted that officer to be removed by Act of Congress, and which, in the Court's view, ordained the Comptroller an "agent" of Congress incapable of executing the law. White aptly characterized the removal provision as a "triviality" that had "lain dormant" for sixty years and that was of "minimal practical significance" given the "substantial role played by the President in the process of removal. . . ." *Id.* at 759, 765, 771. More generally, he objected to "the Court's willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution." *Id.* at 759.

21. Thus, where Congress had not created an administrative remedy, White readily found an implied cause of action in the relevant constitutional or statutory provisions. *See, e.g.,* *Carlson v. Green*, 446 U.S. 14 (1980) (White, J., joining majority); *Davis v. Passman*, 442 U.S. 228 (1979) (White, J., joining majority); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (White, J., joining majority). As he explained in *Nixon v. Fitzgerald*, 457 U.S. 731, 789-90 (1982) (White, J., dissenting):

[I]t is not the exclusive prerogative of the Legislative Branch to create a federal cause of action for a constitutional violation. In the absence of adequate legislatively prescribed remedies, the general federal-question jurisdiction of the federal courts permits the courts to create remedies, both legal and equitable, appropriate to the character of the injury.

22. 457 U.S. 731, 764-97 (1982) (White, J., dissenting). *See also* *Imbler v. Pachtman*, 424 U.S. 409, 432 (1976) (White, J., concurring in judgment).

23. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (White, J.); *see also* *Vitek v. Jones*, 445 U.S. 480 (1980) (White, J.); *Bishop v. Wood*, 426 U.S. 341, 355-61 (1976) (White, J., dissenting); *Goss v. Lopez*, 419 U.S. 565 (1975) (White, J.); *Arnett v. Kennedy*, 416 U.S. 134, 171-203 (1974) (White, J., concurring in part and dissenting in part).

24. *See, e.g.,* *Michigan v. Long*, 463 U.S. 1032 (1983) (White, J., joining majority); *Delaware v. Prouse*, 440 U.S. 648, 652 (1979) (White, J.); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (White, J.). *See generally* Varat, *supra* note 16, at 388-94.

25. *See, e.g., Intercircuit Panel of the United States Act: Hearings on S. 704 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 144-47 (1985) (statement of A. Leo Levin, Director of the Federal Judicial Center, commenting on Justice White's proposals); *Supreme Court Workload: Hearings on H.R. 1968 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 360-61 (1983) (letter from Justice White to Rep. Kastenmeier); *Annual Meeting of American Bar Association*, 51 U.S.L.W. 2119 (1982) (excerpts from speech by Justice White discussing options for streamlining Supreme Court workload).

26. In the 1992 Term alone, Justice White issued 58 dissents from denial of certiorari. *See generally* Michael J. Broyd, Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610 (1987).

On the other hand, White declined to enlarge the role of the federal courts where Congress had spoken. He strictly construed statutory causes of action,<sup>27</sup> and was generally unwilling to infer a private cause of action once Congress had lodged responsibility for enforcement with a federal agency or had provided for administrative remedies.<sup>28</sup> Despite his early, celebrated dissent in *Banco Nacional de Cuba v. Sabbatino*<sup>29</sup>—in which he urged a narrow role for the “act of state” doctrine justifying judicial abstention—White was not uniformly activist on issues of political question, standing, and other prudential limitations on judicial review.<sup>30</sup> Although he often resisted efforts to foreclose habeas review of constitutional claims denied in state court,<sup>31</sup> in recent years he also joined in severely limiting habeas consideration of defaulted claims and successive petitions.<sup>32</sup>

White’s clear sense of the primacy of democratic institutions was reflected in his commitment to the protection of rights to participate in the electoral

27. See, e.g., *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 427 (1985) (White, J.) (“[I]f Congress’ coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them.”). Cf. *Runyon v. McCrary*, 427 U.S. 160, 192 n.2 (1976) (White, J., dissenting) (“I do not question at this point the power of Congress or a state legislature to ban racial discrimination in private school admissions decisions. But as I see it Congress has not yet chosen to exercise that power.”).

White’s close textual interpretation of statutes creating causes of action occasionally led him to assert wider federal jurisdiction. His concurring opinion in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 646 (1979) (White, J., concurring in judgment) (concluding that civil rights legislation of Reconstruction Congress provided remedy for denial not only of constitutional rights but also of rights created by federal statutes), was adopted by a majority of the Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980) (White, J., joining majority). Subsequently, the Court restricted the potential reach of *Thiboutot*. See *Penhurst State Sch. & Hosp. v. Haldeman*, 451 U.S. 1, 33 (1981) (White, J., dissenting in part); *Middlesex County Sewage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981) (White, J., joining majority).

28. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (White, J., dissenting).

29. 376 U.S. 398, 438-72 (1964) (White, J., dissenting). The next year, Congress passed an amendment to the Foreign Assistance Act of 1964 designed to undo the *Sabbatino* decision. 22 U.S.C. § 2370(e)(2) (1964), Pub. L. No. 88-635, 78 Stat. 1013 (1964). In sponsoring the amendment, Senator Hickenlooper placed in the CONGRESSIONAL RECORD White’s full dissent in the case. 110 CONG. REC. 19546, 19548-54 (1964).

30. “Activist” decisions include *Nixon v. United States*, 113 S. Ct. 732, 740 (1993) (White, J., concurring in judgment); *Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992) (White, J.); *Wright v. City of Roanoke Redevelop. & Hous. Auth.*, 479 U.S. 418 (1987) (White, J.); *Clarke v. Securities Ind. Ass’n*, 479 U.S. 388 (1987) (White, J.); *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 502-18 (1985) (White, J., dissenting). More “prudential” decisions include *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (White, J.); *Rizzo v. Goode*, 423 U.S. 362 (1976) (White, J., joining majority); *O’Shea v. Littleton*, 414 U.S. 488 (1974) (White, J.). See generally Mary C. Hutton, *The Unique Perspective of Justice White: Separation of Powers, Standing and Section 1983 Cases*, 40 ADMIN. L. REV. 377 (1988).

31. See, e.g., *Withrow v. Williams*, 113 S. Ct. 1745 (1992) (5-4 decision) (White, J., joining majority opinion refusing to extend *Stone v. Powell* to *Miranda* violations); *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1725-28 (1993) (5-4 decision) (White, J., dissenting from decision easing “harmless error” standard on habeas review); *Stone v. Powell*, 428 U.S. 465, 536-42 (1976) (White, J., dissenting from majority’s restrictions on habeas consideration of Fourth Amendment claims).

32. For instance, Justice White joined the majority opinions in *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986); and *Engel v. Issac*, 456 U.S. 107 (1982). See also *Herrera v. Collins*, 113 S. Ct. 853, 875 (1993) (White, J., concurring in judgment); *Teague v. Lane*, 489 U.S. 288, 316-17 (1989) (White, J., concurring in part and concurring in judgment); *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (White, J., concurring in judgment but declining to adopt majority’s “cause and prejudice” standard).

process. From *Avery v. Midland County*<sup>33</sup> to *Board of Estimate of the City of New York v. Morris*,<sup>34</sup> he led the Court in expansively interpreting the principle of “one person, one vote” in order to ensure that varieties of political apportionment and gerrymandering do not vitiate minority voting rights. His dissent in *City of Mobile v. Bolden*<sup>35</sup> effectively became the majority position two Terms later in *Rogers v. Lodge*,<sup>36</sup> which eased the burden of minority challenges to electoral districting schemes that perpetuate purposeful racial discrimination, and he wrote a strong dissent from last Term’s ruling in *Shaw v. Reno*<sup>37</sup> which struck down a North Carolina redistricting scheme that had been drawn to ensure minority representation.<sup>38</sup> As indicated in *Buckley* and subsequent cases, White was willing to go further than other Justices in permitting legislative regulation of the electoral processes to root out potential corruption and inequality, even at the cost of some inhibition of free speech.<sup>39</sup>

More generally, his First Amendment jurisprudence permitted significant intrusions on the media, whether in the form of the “fairness doctrine,” as in *Red Lion Broadcasting Co. v. FCC*,<sup>40</sup> search warrants, as in *Zurcher v. Stanford Daily*,<sup>41</sup> subpoenas, as in *Branzburg v. Hayes*,<sup>42</sup> or libel law, as in *Herbert v. Lando*<sup>43</sup> and his dissent in *Gertz v. Robert Welch, Inc.*<sup>44</sup> White advocated lesser First Amendment protections for commercial speech<sup>45</sup> and

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33. 390 U.S. 474 (1968) (White, J.).

34. 489 U.S. 688 (1989) (White, J.).

35. 446 U.S. 55, 94 (1980) (White, J., dissenting).

36. 458 U.S. 613 (1982) (White, J.).

37. 113 S. Ct. 2816, 2834 (1993) (White, J., dissenting).

38. See also *Davis v. Bandemer*, 106 S. Ct. 2797 (1986) (White, J.) (holding that gerrymanders that allow group to be “denied its chance to effectively influence the political process” are unconstitutional); *White v. Regester*, 412 U.S. 755 (1973) (White, J.) (striking down multi-member election districts in Texas); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (White, J.) (striking down property-tax-payers only election scheme). White was not concerned with minor variations in population among districts, see, e.g., *Regester*, 412 U.S. at 764; *Gaffney v. Cummings*, 412 U.S. 735 (1973); or relatively unburdensome franchise restrictions, see, e.g., *American Party v. White*, 415 U.S. 767 (1974) (White, J.); *Storer v. Brown*, 415 U.S. 724 (1974) (White, J.); *Williams v. Rhodes*, 393 U.S. 23, 61 (1968) (White, J., dissenting).

39. See *Buckley*, 424 U.S. at 259 (White, J., concurring in part and dissenting in part) (rejecting majority’s conclusion that certain limitations on political contributions violated free speech guarantees); see also *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 507-08 (1985) (White, J., dissenting) (“Congressional regulation of the amassing and spending of money in political campaigns without doubt involves First Amendment concerns, but [the restrictions here] . . . are supported by governmental interests—including, but not limited to, the need to avoid real or apparent corruption—sufficiently compelling to withstand scrutiny”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (White, J., dissenting) (voting to uphold state prohibitions on corporate campaign contributions).

40. 395 U.S. 367 (1969) (White, J.).

41. 436 U.S. 547 (1978) (White, J.).

42. 408 U.S. 665 (1972) (White, J.).

43. 441 U.S. 153 (1979) (White, J.).

44. 418 U.S. 323, 369 (1974) (White, J., dissenting).

45. See, e.g., *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993) (White, J.); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1521 (1993) (White, J., joining dissent); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (White, J.).

showed deference to the regulation and prosecution of obscenity,<sup>46</sup> child pornography,<sup>47</sup> and subversive advocacy.<sup>48</sup> He was a leading opponent of a strict, separatist conception of the establishment of religion, and allowed, for instance, state aid for nonsectarian activities in parochial schools.<sup>49</sup>

Although White gave broad scope to legislative power, he usually subjected the legislative product to close scrutiny for invidious purpose or for insufficient relationship to a legitimate purpose.<sup>50</sup> Thus he dissented in *San Antonio School District v. Rodriguez*<sup>51</sup> on the ground that disparities in school district funding did not serve a rational purpose. Similarly, over a decade later his opinion for the Court in *Cleburne v. Cleburne Living Center*<sup>52</sup> employed the usually lax rational basis test to strike down a zoning ordinance forbidding a group home for retarded persons in a residential neighborhood, while his dissenting opinion in *Lyng v. Castillo*<sup>53</sup> nominally applied a rational basis test in urging that a "natural family" eligibility restriction in food stamp regulations was unconstitutional. In *New York City Transit Authority v. Beazer*,<sup>54</sup> White argued in dissent that the blanket exclusion of methadone users from transit jobs violated both Title VII and the Fourteenth Amendment.

For a period of time, White's purpose analysis produced a more activist equal protection jurisprudence than a majority of the Court was willing to embrace; for example, his 1971 dissent in *Palmer v. Thompson*<sup>55</sup> urged that a Mississippi town should not be permitted to close its swimming pool where its purpose was to prevent implementation of a desegregation order.<sup>56</sup>

46. See, e.g., *Ward v. Illinois*, 431 U.S. 767 (1977) (White, J.); *Smith v. United States*, 431 U.S. 291 (1977) (White, J., joining majority); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (White, J.); *United States v. Reidel*, 402 U.S. 351 (1971) (White, J.). White would not, however, permit censorship of non-obscene expression. See *Barnes v. Glen Theatre*, 111 S. Ct. 2456, 2471 (1991) (White, J., dissenting); *Young v. Arkansas*, 474 U.S. 1070 (1986) (White, J., dissenting from denial of writ of certiorari); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (White, J.).

47. See, e.g., *Osborne v. Ohio*, 495 U.S. 103 (1990) (White, J.); *New York v. Ferber*, 458 U.S. 747 (1982) (White, J.).

48. See, e.g., *United States v. Robel*, 389 U.S. 258, 282-89 (1967) (White, J., dissenting); *Keyishian v. Board of Regents*, 385 U.S. 589, 620-29 (1967) (White, J., joining dissent); *DeGregory v. Attorney General*, 383 U.S. 825, 830 (1966) (White, J., joining dissent).

49. See *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (White, J.) (upholding statute requiring school districts to loan textbooks to students in parochial as well as public and non-sectarian schools); see also *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (White, J., joining majority); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993) (White, J.); *Lee v. Weisman*, 112 S. Ct. 2649, 2678 (1992) (White, J., joining dissent); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400 (1985) (White, J., dissenting in both *Grand Rapids* and in *Aguilar v. Felton*, 473 U.S. 402 (1985)); *Mueller v. Allen*, 463 U.S. 388 (1983) (White, J., joining majority); *Widmar v. Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting); *Lemon v. Kurtzman*, 403 U.S. 602, 661 (1971) (White, J., dissenting in part).

50. See generally William E. Nelson, *Deference and the Limits to Deference in the Constitutional Jurisprudence of Justice Byron R. White*, 58 U. COLO. L. REV. 347 (1987).

51. 411 U.S. 1, 63 (1973) (White, J., dissenting).

52. 473 U.S. 432 (1985) (White, J.).

53. 477 U.S. 635, 643 (1986) (White, J., dissenting).

54. 440 U.S. 568, 597 (1979) (White, J., dissenting).

55. 403 U.S. 217, 240 (1971) (White, J., dissenting).

56. See also *Hunter v. Erickson*, 393 U.S. 385 (1969) (White, J.) (striking down amendment to city charter requiring electoral approval of open-housing ordinance); *Reitman v. Mulkey*, 387 U.S. 369 (1967)



Similarly, in school desegregation cases, White was as ready as any member of the Court to find evidence of past purposeful discrimination and to approve broad remedies. His majority opinions in *Columbus Board of Education v. Penick*<sup>57</sup> and *Dayton Board of Education v. Brinkman*<sup>58</sup> permitted inference of discriminatory purpose from evidence of discriminatory effect and placed the burden on the defendant school system to prove that it had not caused any current racial segregation in its schools. In addition, he held the state, not the defendant school district, ultimately responsible for removing the effects of purposeful discrimination; thus he would have permitted neither the happenstance of school district boundaries nor state laws impeding school funding to stand in the way of remedial decrees. Although he was in a minority in *Milliken v. Bradley*<sup>59</sup> in arguing for a remedy of interdistrict busing, he wrote the five-four decision in *Missouri v. Jenkins*<sup>60</sup> upholding the power of the federal district court to order a defendant school board to impose tax increases in violation of fiscally restrictive state law. In his penultimate Term on the Court, White wrote for an eight-one majority in rejecting the claim that there is a lesser duty to desegregate in higher education.<sup>61</sup>

In the absence of a finding of discriminatory purpose, however, White believed that disparate impact alone did not warrant liability for violating the constitutional principle of equal protection of the laws, and so held in 1976 for seven members of the Court in the seminal case of *Washington v. Davis*.<sup>62</sup> Unlike some members of the *Davis* majority, White never adopted the view that the Constitution prohibits all "reverse discrimination" to counteract diffuse societal discrimination. Thus his joint opinion in *Regents of the University of California v. Bakke*,<sup>63</sup> permitted government to take race into account in university admissions. His votes in *Fullilove v. Klutznick*<sup>64</sup> and *Metro Broadcasting v. FCC*,<sup>65</sup> to uphold federal minority "set-aside" and race-preference requirements, underscored his deference to Congress' authority

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(White, J.) (striking down amendment to California Constitution protecting private discrimination in real estate transactions). See generally Pierce O'Donnell, *Common Sense and the Constitution: Justice White and the Egalitarian Ideal*, 58 U. COLO. L. REV. 433 (1987).

57. 443 U.S. 449 (1979) (White, J.)

58. 443 U.S. 526 (1979) (White, J.).

59. 418 U.S. 717, 762 (1974) (White, J., dissenting).

60. 495 U.S. 33 (1990) (White, J.).

61. *United States v. Fordice*, 112 S. Ct. 2727 (1992). Only Justice Scalia declined to join White's opinion, 112 S. Ct. 2746 (Scalia, J., dissenting in part). In addition to joining the majority opinion, Justice Thomas filed a concurrence emphasizing that in his view that opinion did not "foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges *as such*." *Id.* (Thomas, J., concurring).

62. 426 U.S. 229 (1976) (White, J.). The two dissenters in *Davis*, Justices Brennan and Marshall, urged that the qualifying test for police applicants at issue in that case violated Title VII of the Civil Rights Act of 1964; they explicitly declined to address the constitutional issue. See 426 U.S. at 257 n.1 (Brennan, J., dissenting).

63. 438 U.S. 265, 324 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.).

64. 448 U.S. 448 (1980) (White, J., joining majority).

65. 497 U.S. 547 (1990) (White, J., joining majority).

under the Fourteenth Amendment even as he voted in *City of Richmond v. J.A. Croson Co.* to strike down a local government's "set-aside" scheme.<sup>66</sup>

Although White thus recognized congressional power to permit and even to encourage race-consciousness and other forms of affirmative action, by the end of his tenure he found himself at odds with Congress itself over the extent to which that authority had been exercised in Title VII of the Civil Rights Act of 1964. In 1971 White had joined the majority opinion in *Griggs v. Duke Power Co.*<sup>67</sup> For more than a decade thereafter he appeared content with permitting disparate impact alone to be sufficient for broad, race-conscious remedies in employment discrimination cases brought under Title VII.<sup>68</sup> In 1979, he even joined in refusing to upset a private employer's voluntary use of racial quotas.<sup>69</sup> White began to express significant dissatisfaction with aspects of the prevailing Title VII jurisprudence in a series of opinions, mostly dissenting, in the mid-1980s.<sup>70</sup> By the end of that decade, amid indications that the disparate impact test invited reliance on racial quotas, White commanded a majority in *Wards Cove Packing Co. v. Atonio*<sup>71</sup> to shift the burden of proof in disparate impact cases. *Wards Cove*, together with several other decisions that White joined, were legislatively overturned by the Civil Rights Act of 1991.<sup>72</sup>

66. 488 U.S. 469 (1989) (White, J., joining majority).

67. 401 U.S. 424 (1971) (White, J., joining majority).

68. See generally Lance Liebman, *Justice White and Affirmative Action*, 58 U. COLO. L. REV. 471 (1987). Appearances may have been deceiving. It is instructive to note that *Griggs* was a unanimous opinion written by Chief Justice Burger, in which the Court mentioned several times that the employer had previously engaged in overt, intentional race discrimination, 401 U.S. at 426-27, 428, 429, and in which the Court concluded that the employer's present requirements of a high school diploma and intelligence tests were "artificial, arbitrary, and unnecessary barriers to employment . . . [that] operate invidiously to discriminate on the basis of race[.]" *Id.* at 431. As early as 1977, Justice White expressed some discomfort with liability in disparate impact cases that involved less manifest proof of discrimination. See *Dothard v. Rawlinson*, 433 U.S. 321, 348 (1977) (White, J., dissenting in *Dothard* and concurring in *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 347 (1977)). See also *infra* note 74.

69. *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (White, J., joining majority). Nearly a decade later, White wrote that he had voted to uphold the employer's plan in *Weber* in the belief that it was designed to remedy past intentional discrimination by the employer and union, not simply racial imbalance in job categories, and that he would vote to overrule *Weber* rather than endorse the Court's present interpretation. *Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987) (White, J., dissenting).

70. See *United States v. Paradise*, 480 U.S. 149, 196 (1987) (White, J., dissenting); *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 531-35 (1986) (White, J., dissenting); *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 499-500 (1986) (White, J., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 294-95 (1986) (White, J., concurring in judgment); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (White, J.); see also *Johnson*, 480 U.S. at 616 (White, J., dissenting).

71. 490 U.S. 642 (1989) (White, J.).

72. *Wards Cove* was one of three 5-4 civil rights decisions during October Term 1988 that made it more difficult for employees to make claims against their employers. The other cases were *Lorance v. American Tel. & Tel. Technologies*, 490 U.S. 900 (1989) (White, J., joining majority) (holding that operation of seniority system having disparate impact on men and women is not unlawful unless discriminatory intent is proved), and *Martin v. Wilks*, 490 U.S. 755 (1989) (White, J., joining majority) (holding that new employees are not precluded from challenging employer decisions taken pursuant to consent decree). These decisions were the primary impetus behind the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

White's Title VII jurisprudence was a matter of statutory, not constitutional, interpretation. Yet his wariness about the use of racial quotas in employment was apparent in constitutional cases as well, most notably *Davis*. One may infer several reasons for White's different stances in equal protection cases involving education (such as *Bakke* or *Columbus* and *Dayton*) and those involving employment (such as *Davis*). Even outside the race-discrimination context, White adopted an ethic of equal opportunity in education, as illustrated by his dissent in *San Antonio School District v. Rodriguez*,<sup>73</sup> where he would have struck down school financing schemes that leave the poorest school districts with the worst schools. In addition, while busing does not deny schooling to any child, White expressed particular unhappiness with quota systems that appear to take jobs away from nondiscriminating white workers. Finally, White was clearly concerned that judicial imposition of systems of racial preference in employment would cause upheavals in collective bargaining, regulatory regimes, and other underpinnings of post-New Deal industrial society.<sup>74</sup>

White's belief in the legitimacy of the law in ordering our social life, along with his confidence in the political institutions of government, made him reluctant to impose "decriminalization" either directly (by limiting legislative power to punish), or indirectly (by insisting on perfection from police, prosecutors, and others charged with achieving criminal justice). Even as he joined the holding in *Furman v. Georgia*,<sup>75</sup> striking down a capital punishment scheme that provided no guidance for the sentencing authority, White noted the good faith of Georgia in granting discretion to sentencing juries out of a "desire to mitigate the harshness" of capital punishment laws.<sup>76</sup> Subsequently, he voted to uphold structured death penalty laws, rejecting the arguments that juries "disobey or nullify their instructions"<sup>77</sup> and that others who retain discretion, such as prosecutors, inevitably wield it arbitrarily.<sup>78</sup>

73. 411 U.S. 1, 63 (1973) (White, J., dissenting); see also *supra* notes 49 & 51 and accompanying text.

74. Justice White wrote that liability based solely on discriminatory impact "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Washington v. Davis*, 426 U.S. 229, 248 (1976). This statement suggests that as early as 1976, White was unhappy with disparate impact analysis. As Dean Liebman has noted, this statement "would have been an appropriate sentence in a dissent from *Griggs* itself." Liebman, *supra* note 68, at 477.

75. 408 U.S. 238, 310 (1978) (per curiam) (White, J., concurring in judgment).

76. *Id.* at 313.

77. *Jurek v. Texas*, 428 U.S. 262, 278-79 (1976) (White, J., concurring in judgment in *Jurek* and in *Proffitt v. Florida*, 428 U.S. 242 (1976)).

78. See *Gregg v. Georgia*, 428 U.S. 153, 226 (1976) (White, J., concurring in judgment) ("I decline to interfere with the manner in which Georgia has chosen to enforce [capital punishment] . . . laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner."). Compare White's statement in his dissent in *Escobedo v. Illinois*, 378 U.S. 478, 499 (1964):

Obviously law enforcement officers can make mistakes and exceed their authority, as today's decision shows that even judges can do, but I have somewhat more faith than the Court evidently has in the ability and desire of prosecutors and of the power of the appellate courts

Invoking the Court's ill-famed journey earlier in this century into the realm of substantive due process,<sup>79</sup> he refused to make the judgment that the penalty cannot comport with the Constitution.<sup>80</sup> White did, however, recognize substantive limitations on the types of crimes for which the penalty may be imposed; he wrote *Coker v. Georgia*,<sup>81</sup> holding the death penalty disproportionate for the rape of an adult, and *Enmund v. Florida*,<sup>82</sup> holding capital punishment unavailable where a murder conviction was based solely on a theory of felony murder.

The criteria of "reasonableness" and "good faith," at the core of much of White's jurisprudence, were especially prominent in his approach to the Fourth Amendment.<sup>83</sup> He long urged, persuasively if not entirely successfully, that the overriding command of the Fourth Amendment is its inclusive "reasonableness" requirement, not its more limited "warrant" requirement.<sup>84</sup> He wrote the opinion in *Camara v. Municipal Court of San Francisco*,<sup>85</sup> which spawned a new jurisprudence permitting an array of regulatory searches

to discern and correct such violations of the law.

79. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down New Deal regulation of coal industry); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928) (striking down state limitations on corporate ownership of pharmacies); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down minimum wage law for women); *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down state prohibition of "yellow dog" labor contracts); *Adair v. United States*, 208 U.S. 161 (1908) (striking down federal prohibition of "yellow dog" labor contracts); *Lochner v. New York*, 198 U.S. 45 (1905) (striking down state law setting maximum hours for bakers); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (striking down state insurance licensing). See generally Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969*, at 98-169 (1972).

80. See *Roberts v. Louisiana*, 428 U.S. 325, 363 (1976) (White, J., dissenting) (decrying majority's "surrender . . . to the temptation to make policy for and to attempt to govern the country through a misuse of the powers given this Court under the Constitution"); *Gregg v. Georgia*, 428 U.S. 153, 226 (1976) (White, J., concurring in judgment) ("Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law."); see also *supra* note 8 and accompanying text and *infra* notes 112, 115.

81. 433 U.S. 584 (1977) (plurality opinion) (White, J.).

82. 458 U.S. 782 (1982) (White, J.).

83. See Kate Stith, *Search and Seizure*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 480 (Leonard W. Levy et al. eds., Supp. I 1992). In addition to the cases cited below, see, e.g., *Jacobson v. United States*, 112 S. Ct. 1535 (1992) (White, J.) (5-4 decision) (holding that government agents had entrapped defendant in child pornography case); *United States v. Watson*, 423 U.S. 411, 423-24 (1976) (upholding federal regulation authorizing warrantless arrests based on probable cause, so as to avoid "encumber[ing] criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like").

84. The first clause of the Fourth Amendment provides for "[t]he right of the people to be secure . . . against unreasonable searches and seizures," while the second clause provides that "no Warrants shall issue, but upon probable cause . . ." Examining the framing of the Amendment and historical practice, Justice White argued that the purpose of the warrant clause was to prohibit general warrants, not to require warrants for all searches and seizures. See, e.g., *Payton v. New York*, 445 U.S. 573, 603 (1980) (White, J., dissenting); *Chimel v. California*, 395 U.S. 752, 780-81 (1969) (White, J., dissenting). Recent historical scholarship is in accord. See, e.g., Akhil Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. (forthcoming 1994).

85. 387 U.S. 523 (1967) (White, J.). The dissenters argued that the Fourth Amendment, or at least its warrant clause, did not apply at all to civil inspections. See *v. City of Seattle*, 387 U.S. 541, 546 (1967) (Clark, J., dissenting as to both *Camara* and *See*.)

based on less than probable cause.<sup>86</sup> Yet he also wrote *Tennessee v. Garner*,<sup>87</sup> which limited on Fourth Amendment grounds the use of deadly force against fleeing felons.<sup>88</sup> His oft-stated antipathy to the exclusionary rule as a remedy for Fourth Amendment violations<sup>89</sup> finally led to adoption of the "good faith" exception to that rule in *United States v. Leon*.<sup>90</sup> White likewise took a functional and pragmatic approach to the Sixth Amendment's right to jury trial.<sup>91</sup> He resisted efforts to limit criminal investigations and forfeitures through broad application of the right to counsel;<sup>92</sup> he dissented from interpretations of the Fifth Amendment privilege against compelled self-incrimination that departed from historical practice and might impede the reliable administration of justice;<sup>93</sup> and he was at the forefront of the Court in allowing great leeway in plea bargaining, as in *Brady v. United States*.<sup>94</sup>

White's criminal procedure opinions revealed not only his perspective on issues of criminal justice but also his unusual commitment to the rule of stare decisis in constitutional adjudication, which sometimes led to the perception

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86. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (White, J., joining majority holding that "reasonable suspicion" is sufficient for street stop, as well as concurring separately, 392 U.S. at 34); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1973) (holding that reasonable suspicion is sufficient for Border Patrol stops for questioning) (Justice White's concurring opinion appears at *United States v. Ortiz*, 422 U.S. 891, 914 (1973), concurring in judgments as to both *Brignoni-Ponce* and *Ortiz*); *Delaware v. Prouse*, 440 U.S. 648, 663 n.26 (1976) (White, J.) (suggesting that states may stop vehicles at inspection checkpoints without reasonable suspicion as long as stops are random; over a decade later, the Court upheld such a checkpoint program, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (White, J., joining majority)); *New Jersey v. T. L.O.*, 469 U.S. 325 (1984) (White, J.) (permitting limited school searches on reasonable suspicion); *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (White, J., joining majority) (upholding Customs Service drug testing program); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (White, J., joining majority) (upholding testing of workers involved in railroad accidents or safety violations).

87. 471 U.S. 1 (1985) (White, J.).

88. Taken together, White's opinions on the Fourth Amendment comprehend a protection of broad scope yet uncertain depth. Or, "[a]s one critic of his decisions has said, [Justice White] sees the Fourth Amendment as 'a mile wide and a millimeter deep.'" Monroe E. Price, *White: A Justice of Studied Unpredictability*, NAT'L L.J., Feb. 18, 1980, at 24.

89. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 246 (1983) (White, J., concurring in judgment); *Stone v. Powell*, 428 U.S. 465, 537 (1976) (White, J., dissenting).

90. 468 U.S. 897 (1984) (White, J.).

91. On the one hand, White wrote a series of opinions establishing that an impartial and fairly chosen jury is fundamental to the American scheme of justice. See, e.g., *Turner v. Murray*, 476 U.S. 28 (1986) (White, J.); *Duren v. Missouri*, 439 U.S. 357 (1979) (White, J.); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (White, J.); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (White, J.). On the other hand, he dispensed with the need for unanimity or 12 persons on a jury. See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion) (White, J.); *Williams v. Florida*, 399 U.S. 78 (1970) (White, J.).

92. See, e.g., *United States v. Monsanto*, 491 U.S. 600 (1989) (White, J.); *United States v. Wade*, 388 U.S. 218, 250 (1967) (White, J., concurring in part and dissenting in part); *Massiah v. United States*, 377 U.S. 201, 207 (1964) (White, J., dissenting). Compare *Austin v. United States*, 113 S. Ct. 2801 (1993) (White, J., joining majority) (holding Eighth Amendment's excessive fines clause applicable to civil forfeiture).

93. See, e.g., *Orozco v. Texas*, 394 U.S. 324, 328 (1969) (White, J., dissenting); *Miranda v. Arizona*, 384 U.S. 436, 526 (1966) (White, J., dissenting); *Griffin v. California*, 380 U.S. 609, 617 (1965) (White, J., joining dissent); *Malloy v. Hogan*, 378 U.S. 1, 33 (1964) (White, J., dissenting).

94. 397 U.S. 742 (1970) (White, J.); see also *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (White, J., joining majority); *Ricketts v. Adamson*, 483 U.S. 1 (1987) (White, J.).

that he was "unpredictable."<sup>95</sup> Like many Justices, White was ready to overrule previous decisions that proved unworkable or ill-advised. For instance, he joined *Batson v. Kentucky*,<sup>96</sup> which, overruling his own *Swain v. Alabama*,<sup>97</sup> subjected preemptory jury challenges to judicial review for racial discrimination; in his concurring opinion in *Batson*, White acknowledged that *Swain*'s confidence in state prosecutors had not been vindicated.<sup>98</sup> Yet White, more than other Justices (regardless of ideological inclination), on most issues sought to adhere to constitutional precedent *not yet overruled*. In practical terms this meant that White sparingly dissented in constitutional cases on the ground that the controlling precedent was wrongly decided.<sup>99</sup>

Thus, although he dissented forcefully in *Miranda*,<sup>100</sup> he clearly accepted the major contours of that decision. Indeed, he wrote *Edwards v. Arizona*,<sup>101</sup> which went beyond the core of *Miranda* in prohibiting police-initiated questioning once the suspect in custody has requested an attorney.<sup>102</sup> Similarly, despite his long, carefully composed dissent from the holding in *Payton v. New York*<sup>103</sup> which required a warrant to arrest someone in his home, White ten years later wrote the majority opinion applying *Payton* to the arrest of someone hiding out overnight in a friend's home.<sup>104</sup> Even where he

95. See, e.g., Kenneth Jost, *The Courtship of Byron White*, A.B.A. J., Oct. 1993, at 62-63 (quoting commentators); Marcia Coyle, *The High Court's Center Falls Apart*, NAT'L L.J., Aug. 23, 1993, at S1; Monroe Price, *supra* note 88, at 24. But see Stuart Taylor, Jr., *Justice Byron White: The Consistent Curmudgeon*, CONN. L. TRIB., March 29, 1993, at 24.

96. 476 U.S. 79 (1986) (White, J., joining majority).

97. 380 U.S. 202 (1965) (White, J.).

98. 476 U.S. at 101 (White, J., concurring).

99. Two significant lines of cases in which White refused to be bound by precedent he considered wrongly decided were separation of powers cases, see *supra* notes 17-20 and accompanying text, and abortion rights cases, see *infra* notes 113-17 and accompanying text.

100. *Miranda v. Arizona*, 384 U.S. 436, 526 (1966) (White, J., dissenting). White also dissented vehemently in *Massiah v. United States*, 377 U.S. 201, 207 (1964), which appeared to create a broad, pre-trial right to counsel under the Sixth Amendment. White never advocated overruling *Massiah*, but consistently gave it narrow scope, see, e.g., *Patterson v. Illinois*, 487 U.S. 285 (1988) (White, J.); *United States v. Henry*, 447 U.S. 264, 277 (1980) (White, J., joining dissent).

101. 451 U.S. 477 (1981) (White, J.).

102. See also *Withrow v. Williams*, 113 S. Ct. 1745 (1993) (White, J., joining majority) (refusing to limit habeas consideration of *Miranda* claims); *Arizona v. Fulminante*, 111 S. Ct. 1246, 1253-57 (1991) (White, J., dissenting from majority's holding that admission of involuntary confession is subject to harmless error analysis); *Minnick v. Mississippi*, 498 U.S. 146 (1990) (White, J., joining majority opinion applying *Edwards*); *Arizona v. Roberson*, 486 U.S. 675 (1988) (White, J., joining majority opinion applying *Edwards*). See generally Stuart Taylor, Jr., *When Judicial Flips Aren't Flops*, AM. LAW., Dec. 17, 1990, at 23.

103. 445 U.S. 573, 603-20 (1980) (White, J., dissenting).

104. *Minnesota v. Olson*, 495 U.S. 91 (1990) (White, J.); see also *James v. Illinois*, 493 U.S. 307 (1990) (5-4 decision) (White, J., joining majority applying exclusionary rule); *Stone v. Powell*, 428 U.S. 465, 536-42 (1976) (White, J., dissenting) (expressing disagreement with but accepting validity of broad exclusionary rule). Justice White's opinion in *James*, where he provided the fifth vote refusing to undermine the exclusionary rule by permitting illegally seized evidence to impeach a defense witness, surprised some observers. See Linda Greenhouse, *High Court, 5-4, Reaffirms Curbs on Trial's Use of Illegal Evidence*, N.Y. TIMES, Jan. 11, 1990, at A1; David O. Stewart, *White to the Right?*, A.B.A. J., July 1990, at 40, 42.

White's adamant adherence to stare decisis was revealed outside of criminal law opinions as well. In his final Term, White wrote the majority opinion holding that New York law violated the First

was clearly prepared to vote to overrule a precedent, White sometimes exasperated even sympathetic observers by refusing to cast the fifth vote for simply narrowing the reach of the precedent, insisting he was bound until a majority of the Court expressly overruled the controlling case.<sup>105</sup>

The most controversial decision by White upholding government power to invoke the criminal process was *Bowers v. Hardwick*,<sup>106</sup> which refused to strike down a Georgia law forbidding sodomy.<sup>107</sup> White conceived the issue much as he had in the death penalty and abortion cases: whether the Supreme Court should bypass political institutions to establish a new social order. White had long objected to the Court's enunciation of new constitutional rights deriving from the concept of "privacy." His concurring opinion in *Griswold v. Connecticut*<sup>108</sup> declined to find a general privacy right, emphasizing instead the lack of a rational relationship between the statute's ban on distributing contraceptive information to married persons and the asserted purpose of the statute. *Roe v. Wade*,<sup>109</sup> the case recognizing a broad right to abortion, evoked a response reminiscent of his *Miranda* dissent: "The Court simply fashions and announces a new constitutional right . . . with scarcely any reason or authority."<sup>110</sup> In dissents in subsequent privacy rights cases during the 1970's and early 1980's, including *Moore v. City of East Cleveland*,<sup>111</sup> which struck down a zoning ordinance that narrowly defined "single family," White

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Amendment by denying after-hours use of school property for religious purposes, while allowing such use for a wide variety of social, civic, and educational purposes. *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141 (1993). White insisted on citing, and distinguishing, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), even though he had disagreed strongly with the reasoning in *Lemon*, *id.* at 661-71 (White, J., concurring in judgment and dissenting in part), and had repeatedly criticized it. Justice Scalia responded that "the Court's invocation of the *Lemon* test" was "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," and pointedly noted that White himself had "personally driven pencils through the creature's heart." 113 S. Ct. at 2149-50 (Scalia, J., concurring). White replied in a footnote that "there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled." *Id.* at 2148 n.7 (White, J.).

105. For instance, although Justice White vehemently dissented from the prohibition on "victim impact statements" in *Booth v. Maryland*, 482 U.S. 496, 515 (1987) (White, J., dissenting), he refused to join four dissenters who sought to narrow *Booth* significantly two years later. *South Carolina v. Gathers*, 490 U.S. 805, 812 (1989) (White, J., concurring) ("Unless *Booth* . . . is to be overruled, the judgment below must be affirmed."). Justice White joined the majority in explicitly overruling *Booth* in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

Similarly, although Justice White issued a strong dissent in *Robinson v. California*, 370 U.S. 660, 685-89 (1962), *see supra* note 8, he refused to join the plurality opinion in *Powell v. Texas*, 392 U.S. 514 (1968), that effectively abandoned *Robinson's* radical narrowing of the role of the criminal law; he instead wrote a concurring opinion that accepted the doctrinal framework of *Robinson*. *Id.* at 548 (White, J., concurring in judgment). Despite the absence of a clear majority in *Powell*, that case is regarded as having all but overruled *Robinson*.

106. 478 U.S. 186 (1986) (White, J.).

107. The Georgia statute at issue outlawed all sodomy, including that between men and women. The Court only addressed the challenge to the statute as applied to "consensual homosexual sodomy." 478 U.S. at 188 n.2.

108. 381 U.S. 479, 502 (1965) (White, J., concurring in judgment).

109. 410 U.S. 113 (1973).

110. *Doe v. Bolton*, 410 U.S. 179, 221-22 (1973) (White, J., dissenting in both *Doe* and *Roe*).

111. 431 U.S. 494, 541 (1977) (White, J., dissenting).

even more explicitly compared the Court's "new" substantive due process to the efforts of the *Lochner* Court to impose its will upon a divided polity.<sup>112</sup>

For thirteen years after *Roe*, White purported to be bound by the holding of that case. He dissented in abortion rights cases applying *Roe*, but always from within the framework of *Roe*—contending that the challenged restriction on abortion should be upheld even accepting *Roe*.<sup>113</sup> Finally, however, in 1986, in his dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>114</sup> White advocated overruling *Roe*,<sup>115</sup> urging that the right it recognized was neither "implicit in the concept of ordered liberty" nor "deeply rooted in this Nation's history and tradition."<sup>116</sup> For White, *Bowers* was a replay of *Thornburgh*, with the important difference that he was writing the majority opinion. As White must have anticipated, once a majority of the Court had adopted his approach to the enunciation of a fundamental right, it was only a matter of time before *Roe* itself would begin to collapse, as indeed it did in *Webster v. Reproductive Health Services*.<sup>117</sup>

Yet White himself had recognized certain fundamental liberty interests that may be subsumed under the label substantive due process—including, in *Griswold*, "the right . . . to be free of regulation of the intimacies of the marriage relationship"<sup>118</sup> and, in a long series of cases (continuing even after *Bowers*) dealing with illegitimacy, the "protected liberty interest" that parents have in a relationship with their children.<sup>119</sup> And even if White was not

112. *Id.* at 544 ("[T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.").

113. *See, e.g., Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (White, J., joining dissent); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 92 (1976) (White, J., dissenting in part).

114. 476 U.S. 747, 785 (1986) (White, J., dissenting).

115.

In my view, the time has come to recognize that *Roe v. Wade*, no less than the cases overruled by the Court in the [New Deal] decisions I have just cited, 'departs from a proper understanding' of the Constitution and to overrule it. I do not claim that the arguments in support of this proposition are new ones . . . . But if an argument that a constitutional decision is erroneous must be novel in order to justify overruling that precedent, the Court's decisions in *Lochner v. New York* and *Plessy v. Ferguson* would remain the law . . . .

*Id.* at 788 (citations omitted).

116. *Id.* at 790-94. White made clear that he did not necessarily approve of either of these tests for recognizing fundamental rights, but realized that a majority of the Court had adopted them. White also argued that even accepting *Roe* and its progeny, the abortion restrictions at issue should have been upheld. *Id.* at 797-814.

117. 492 U.S. 490 (1989). Justice White joined the plurality opinion written by Chief Justice Rehnquist, *id.* at 513. The collapse of *Roe v. Wade* was halted, it appears, in *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992). In *Casey*, Justice White again joined the opinion of Chief Justice Rehnquist, this time an opinion concurring in the judgment in part and dissenting in part, *id.* at 2855; he also joined Justice Scalia's even more emphatic and provocative opinion concurring in the judgment in part and dissenting in part, *id.* at 2873.

118. 381 U.S. at 502-03 (White, J., concurring in judgment).

119. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 157 (1989) (White, J., dissenting); *see also Lehr v. Robertson*, 463 U.S. 248, 268 (1983) (White, J., dissenting); *Parham v. Hughes*, 441 U.S. 347, 361 (1979) (White, J., dissenting); *Stanley v. Illinois*, 405 U.S. 645 (1972) (White, J.).



prepared to consider homosexual rights as an aspect of substantive due process, he might still have recognized discrimination on the basis of sexual orientation as invidiously motivated, and thus unconstitutional pursuant to his purpose-based approach to equal protection.<sup>120</sup> White, however, declined to address homosexual rights (or abortion rights) within the framework of equal protection law. Here as elsewhere, Justice White's jurisprudence seldom put the Court ahead of the country. For him, the Court's primary role in constitutional lawmaking is not to pioneer or even to lead but, rather, to secure for the whole Nation the democratic consensus that has already been reached.

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120. See *supra* text accompanying notes 50-62.

